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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,

Plaintiff

v.

STATE OF IDAHO; STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES, an
agency of the State of Idaho, and GARY
SPACKMAN, in his official capacity as Director of
the Idaho Department of Water Resources

Defendants,

IDAHO HOUSE OF REPRESENTATIVES; MIKE
MOYLE, in his official capacity as Majority Leader
of the House; IDAHO SENATE; and CHUCK
WINDER, in his official capacity as President Pro
Tempore of the Senate,

Applicants in Intervention, and

JOYCE LIVESTOCK CO.; LU RANCHING CO.;
PICKETT RANCH & SHEEP CO; and IDAHO
FARM BUREAU FEDERATION,

Applicants in Intervention.

Case No. 1:22-cv-00236-DCN

**DEFENDANT-INTERVENORS
JOYCE LIVESTOCK CO., LU
RANCHING CO., PICKETT RANCH
& SHEEP CO., AND IDAHO FARM
BUREAU FEDERATION'S
MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE**

Introduction

Joyce Livestock Company, LU Ranching Company, Pickett Ranch and Sheep Company, and the Idaho Farm Bureau Federation (collectively “Ranchers”) seek to intervene as defendants in the above-captioned case and defend the lawfulness of Idaho’s procedural stockwater statutes against the federal government. Ranchers have a direct interest in the outcome of this litigation. Their intervention will not delay this proceeding; they are prepared to meet all deadlines set by this Court. And respectfully, neither the existing defendants nor the legislative applicants in intervention can adequately represent the interests of Ranchers, the very individuals whose substantive rights are at issue in this case, and whose ability to vindicate those rights will turn on this case’s disposition.

Prior to filing the motion to intervene, counsel for Ranchers conferred with counsel for the original parties to this action and counsel for the proposed legislative intervenors. Counsel for the State of Idaho defendants take no position on Ranchers’ motion. Counsel for the Idaho legislative applicants in intervention do not oppose Ranchers’ motion. Counsel for the United States stated that they reserve their position on Ranchers’ motion, pending their review of this filing.

Factual and Legal Background

State law generally defines the grant and limitation of water rights. For almost half a century, it has been settled that each state’s own law governs the rights to state waters used for livestock on United States Forest lands within that state. *See United States v. New Mexico*, 438 U.S. 696, 716 (1978) (affirming a holding that “any stockwatering rights [on national forest lands] must be allocated under state law to individual stockwaterers”). Congress saw no “need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.” *Id.* at 717.

In the state of Idaho, there is no dispute that all water is held in trust by the State for the benefit of the people of Idaho. I.C. § 42-101. Under Idaho law, constitutional appropriation of stockwater rights requires application of the water to a beneficial use. *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Idaho 2007) (“*Joyce*”) (“The constitutional method of appropriation requires that the appropriator actually apply the water to beneficial use.”) Even if successfully acquired, such water rights are forfeited if not put to beneficial use for five years. I.C. § 42-222(2). In such a case, the water right reverts to the state and is again subject to appropriation. *Id.*¹

The United States objects to Idaho’s laws as a policy matter, and has sought for decades to own water rights to which it is not entitled. In the litigation that led to the *Joyce* decision, for example, the United States took the position that it should be able to appropriate water rights, and avoid forfeiting them, even where neither the United States nor its agent had put those rights to beneficial use by watering livestock. *See Joyce*, 156 P.3d at 518-19. Specifically, the United States claimed that it, not ranchers, should reap the water rights accruing from ranching permittees putting water to beneficial use. In the Snake River Basin Adjudication and related matters, the United States exploited the complexity of the law and adjudicatory processes, its vastly superior financial and legal resources, and its influence over livestock grazing permits, to obtain default decrees to stockwater rights that it had never lawfully appropriated through beneficial use. The United States has also pressured grazing permittees to enter agreements to act as its agents with the goal of appropriating those permittees’ stockwater rights to itself.

Having failed to thwart the substantive requirements of Idaho’s water law, the United States now seeks to prevent enforcement of that law by asking this Court to outlaw the process for

¹ Idaho Code provides for various exceptions to this general forfeiture rule, but none are relevant to this case. *See* I.C. § 42-223.

administering it. *See* Dkt. 11. When Idaho’s legislature created a process to efficiently identify decreed stockwater rights that the United States has forfeited by lack of beneficial use – a problem created in the first instance because the United States does not put the water to the required beneficial use – the United States sued to halt the process and avoid scrutiny of how and by whom the water is used. Indeed, the evidence in this case will show that the Idaho water at issue is used by Idaho’s ranchers, such as proposed intervenors here, who are or who represent federal grazing permittees—not by the United States itself.

The case at bar thus directly implicates two sets of fundamental but distinct rights: (1) the right of the state of Idaho to make law governing the administration and adjudication of rights to the water it governs, and (2) the rights of Idaho ranchers, who seek to defend the water rights they own pursuant to Idaho’s law, to limit the United States’ interference with ranching operations through the inappropriate assertion of junior or competing rights, and to acquire rights to water improperly claimed by the federal government.. The State of Idaho is properly a defendant in this case, as it has a duty to defend the first set of rights. But the Ranchers are essential defendants in this case, too, as they seek to protect the second set of rights.

Federal Rule of Civil Procedure 24(a) provides for intervention as of right by a party who “claims an interest relating to the property or transaction that is the subject of the action,” and whose ability to protect his interest may be impaired or impeded by the disposition of the case, unless that interest is adequately represented by existing parties. *Cooper v. Newsom*, 13 F.4th 857, 864 (9th Cir. 2021). Pursuant to Fed. R. Civ. P. 24(a), Ranchers have moved to intervene as of right in the above-captioned case as Intervenor-Defendants.

“An applicant for intervention as of right must satisfy four criteria under Rule 24(a)(2).”

United States v. Idaho, No. 1:22-cv-00329-BLW, 2022 WL 3346255, *3 (D. Idaho, Aug. 13, 2022). They are:

- (1) the application for intervention must be timely;
- (2) the applicant must have a ‘significantly protectable’ interest relating to the property or transaction that is the subject of the action;
- (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect that interest; and
- (4) the applicant’s interest must not be adequately represented by the existing parties in the lawsuit.

Animal Legal Def. Fund v. Otter, 300 F.R.D. 461, 464 (D. Idaho 2014) (citing *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001)); see also *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020) (citing Fed. R. Civ. P. 24(a)(2)). “In evaluating whether these requirements are met, courts are guided primarily by practical and equitable considerations.” *Callahan v. Brookdale Senior Living Cmty., Inc.*, --- F.4th ---, 2022 WL 3016027, at *5 (9th Cir. June 29, 2022) (internal quotation marks and citation omitted). While applicants bear the burden of establishing the elements, courts construe Rule 24(a) broadly in favor of proposed intervenors. *Id.*

Separately, Federal Rule of Civil Procedure 24(b) provides for permissive intervention by a party who has a claim or defense that shares with the main action a common question of law or fact, and whose intervention will not unduly delay or prejudice the adjudication of the original parties’ rights. See *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002) (noting “if there is a common question of law or fact, the requirement of [Rule 24(b)] has been satisfied and it is then discretionary with the court whether to allow intervention”), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Thus, to the extent that the Court denies Ranchers intervention under Fed. R. Civ. P. 24(a), in the alternative, Ranchers move for permissive intervention pursuant to Fed. R. Civ. P. 24(b).

Applicants in Intervention

I. Idaho Farm Bureau Federation

Idaho Farm Bureau Federation (“IFBF”) is a free, independent, non-governmental, voluntary organization of nearly 80,000 Idaho families dedicated to strengthening agriculture and protecting the rights, values, and property of its member families and neighbors. Hendricks Dec. ¶ 3. IFBF addresses local, county, state, national, and international issues. It is non-partisan. Hendricks Dec. ¶ 6. IFBF was organized in 1939 as an independent farm organization. Hendricks Dec. ¶ 5. It was chartered under the laws of the state of Idaho in May of 1939, and maintains status as a 501(c)(5) non-profit corporation. Hendricks Dec. ¶ 5.

The numerous members of the agricultural community represented by IFBF include co-movants Joyce Livestock Co., LU Ranching Co., and Pickett Ranch & Sheep Co., each further described below. Hundreds of IFBF’s members are permittees on federal grazing allotments within Idaho, some of which are listed as being at issue in this suit. Hendricks Dec. ¶ 4. In recent decades, IFBF has observed various efforts to appropriate Idaho ranchers’ stock watering rights on BLM and USFS grazing allotments. Hendricks Dec. ¶ 7. These efforts include the United States’ actions in the Snake River Basin Adjudication, in litigation against Idaho ranchers, and in pressuring ranchers to sign agreements purporting to make them agents of the federal government. Hendricks Dec. ¶¶ 7-10. The matter before this Court represents the United States’ most recent effort to thwart ranchers’ property rights under Idaho law. Hendricks Dec. ¶ 12. A victory for the United States in this matter would render ranchers’ water rights more difficult to vindicate and would aid the United States in maintaining decrees of stockwater rights long after it has forfeited those rights under state law by lack of beneficial use. Hendricks Dec. ¶¶ 13-14.

II. Joyce Livestock Co.

Joyce Livestock Company is a member of IFBF and a federal grazing permittee that holds stockwater rights on federally-owned land. Nettleton Dec. ¶¶ 4, 5. The 150-year-old, fifth-generation family ranch was named party to the landmark 2007 Idaho Supreme Court decision that vindicated ranchers' stockwater rights under existing state law, despite the federal government's (generally successful) efforts to obtain default or "negotiated" decrees as part of the Snake River Basin Adjudication. *See Joyce Livestock Co. v. United States*, 156 P.3d 502 (Idaho 2007). *See also* Dkt. 11 at 10-11.

Ranchers Paul Nettleton of Joyce Livestock Co. and Tim Lowry of LU Ranching Co. (described further below) have been honored by the agricultural community for fighting back against BLM's challenge to their stockwater rights, a fight which lasted ten years and incurred more than a million dollars in legal fees, for which the courts denied reimbursement. Nettleton Dec. ¶¶ 10-12; Lowry Dec. ¶¶ 9-10. According to then Ada County Farm Bureau President Don Sonke, "[Joyce and LU Ranching Companies'] legal battle secured water rights on the range for generations," and "those water rights saved ranching in Idaho as we know it. . . . they've sacrificed a lot." Nettleton Dec. ¶ 12.

III. LU Ranching Co.

LU Ranching Co. is a family ranching corporation incorporated in 1976 as a successor to the prior generation's ranch. Lowry Dec. ¶ 2. LU Ranching is a cow and calf operation, and runs about 400 mother cows. Lowry Dec. ¶ 2. Their operation depends on grazing their livestock on public lands; the ranch holds BLM grazing permits for the spring, summer, and early fall seasons. Lowry Dec. ¶ 4.

During the Snake River Basin Adjudication, LU Ranching filed for stockwater rights on their private land and on the grazing allotments where they engaged in beneficial use. Lowry Dec. ¶ 5. The United States objected to their filings, and they, like Joyce Livestock, were sucked into a decade of expensive litigation. Lowry Dec. ¶¶ 6-7. LU Ranching's case was a companion case to *Joyce Livestock Co.*, decided the same day under the same reasoning. *See LU Ranching Co. v. United States*, 156 P.3d 590 (Idaho 2007) (Mem. Op.). Due to erroneous advice from a state agency employee prior to obtaining legal representation, however, LU Ranching had failed to file timely objections to the United States' filings; the United States was thus able to obtain default decrees concerning junior (later appropriated) stockwater rights which it has since forfeited by lack of beneficial use. *See* Lowry Dec. ¶¶ 13-15.

IV. Pickett Ranch & Sheep Co.

Pickett Ranch & Sheep Co. is a family operation dating back to 1881. Pickett Dec. ¶¶ 1-2. The ranch is currently operated by Douglas, David, and Don Pickett, the fourth generation of Picketts and their sons are the fifth generation of full-time Pickett ranchers. Pickett Dec. ¶ 3. Some of their employees have worked with the family for half a century. Pickett Dec. ¶ 7.

The Picketts' ranch was party to what Plaintiff terms the "FSG settlement." *See* Dkt. 11 at ¶ 35; Dkt. 11-3 at 12, 17; Pickett Dec. ¶ 11. As a result of that settlement, Pickett Ranch & Sheep Co. holds stockwater right decrees on its grazing allotments, but it was required to waive its objections to various United States' stockwater claims and default decrees. Pickett Dec. ¶¶ 12-13. Don Pickett believes that the limitations imposed on the ranch's exercise of its rights by the settlement renders those rights effectively worthless, because the settlement assigns rights to the federal government that allow it to effectively dictate the Picketts' use of their own water rights. Pickett Dec. ¶¶ 13-15. If Idaho prevails in this litigation and water rights not put to beneficial use

by the United States are forfeit, the FSG settlement and Pickett Ranch & Sheep Co. as a party to it may be directly impacted.

Argument

I. Ranchers Are Entitled to Intervene as of Right.

Ranchers are entitled to intervene in this action as of right under Fed. R. Civ. P. 24(a) because their application is timely, they have a significantly protectable interest relating to this action, their ability to protect their interest may be impaired by the disposition of this action, and because, respectfully, their interests are not adequately represented by the existing parties and/or other applicants in intervention.

A. Ranchers' Motion to Intervene Is Timely.

Whether a motion to intervene is timely under Fed. R. Civ. Pro. 24(a) depends on three factors: (1) the stage of the proceeding; (2) prejudice to other parties; and (3) the length of a reason for any delay. *See W. Watersheds Project v. Ashe*, Case No. 4:11-CV-00462-EJL, 2012 WL 12899085 at *2 (D. Idaho Mar. 1, 2012); *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016).

With respect to the first factor, this case is at its earliest stage. Plaintiffs' First Amended Complaint was filed on July 15, 2022. Dkt. 11. The state of Idaho defendants' Answer was filed on July 29, 2022. Dkt. 13. Counsel for Ranchers informed counsel for the original parties and Idaho legislative applicants in intervention of Ranchers' intent to intervene on August 5, 2022, and received their positions on August 8 (legislative applicants in intervention), August 10 (state of Idaho defendants), and August 12 (United States). The case was reassigned on August 19, 2022. As of the date of this filing, no briefing or discovery has occurred or even been scheduled. The existing parties are due to file a proposed litigation plan on August 30, 2022, and are already aware

of Ranchers' position regarding discovery and briefing schedules. (Ranchers suggest that their briefing be due one to two weeks after state of Idaho defendants' briefing to avoid duplication, but are amenable to simultaneous briefing if the Court prefers. Ranchers are also amenable to expediting the case by minimizing discovery.)

While Ranchers' preparation and filing of this motion was delayed briefly in August by their primary counsel's contraction of the flu and of COVID-19 in quick succession, this filing nevertheless precedes any action in the case that would cause prejudice to the existing (or proposed) parties.² "[P]rejudice to existing parties is the most important consideration in deciding whether a motion for intervention is untimely." *Smith v. Los Angeles Unified School District*, 8930 F.3d 843, 857 (9th Cir. 2016) (cleaned up). Where, as here, intervention is sought so early as to wholly preclude the possibility of such prejudice, it is timely.³

B. Ranchers Have Significant Protectable Interests in this Action, and Those Interests May Be Impaired by the Outcome of This Litigation.

When evaluating the second and third prongs of an intervention inquiry – (2) whether a proposed intervenor as of right demonstrates a significant protectable interest under Rule 24(a), and (3) whether that interest may be impaired by the outcome – “the Court must follow ‘practical and equitable considerations and construe the Rule broadly in favor of proposed intervenors.’”

Western Watersheds Project v. U.S. Fish and Wildlife Svc., 2011 WL 2690430 at *3, quoting

² *Cf. United States v. State of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (holding district court abused discretion by denying intervention as of right fifteen years after the commencement of action and five years after settlement based on the “stage of the proceeding” where “the possibility of new and expanded negotiations” that motivated intervention had emerged relatively recently).

³ Only prejudice “which flows from a prospective intervenor’s failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented” is relevant to the timeliness inquiry; the Court is not permitted to consider “prejudice” in the sense of intervention’s rendering the potential substantive resolution of a case more difficult. *Smith*, 830 F.3d at 857. A finding of prejudice based on a factor other than delay is abuse of discretion. *Id.* at 857-58.

Wilderness Society v. U.S. Forest Service, 630 F.3d 1173, 1179 (9th Cir. 2011). “A prospective intervenor has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.” *Id.*

Here, Ranchers—who indisputably hold (or, in the case of IFBF, whose members hold) permits to graze their livestock on federal land and associated stockwater rights—have a protectable interest in preserving and vindicating their rights. *See Western Watersheds Project v. U.S. Fish and Wildlife Svc.*, 2011 WL 2690430 at *3 (holding ranchers’ interest in grazing cattle on land sufficient to intervene as of right where they “may have to undertake mitigation measures or cease certain activities” as a result of case’s disposition).

This case exists only because grazing permittees’ interest in their stockwater rights conflicts with existing and potential competing claims by the United States to the same water. *See, e.g.*, Dkt. 11 at ¶¶ 81-83. The outcome of this case, by determining the legality of Idaho’s statutes governing the United States’ stockwater rights, will make Ranchers’ rights either easier or more difficult to preserve and/or vindicate. This case will determine how, when, and whether competing claims made or decrees held by the United States are evaluated and potentially identified as having been forfeited. The United States seems to agree. *See id.* at ¶ 81 (accusing Idaho of seeking “to render [stockwater rights] appurtenant to grazing permittees’ private property”). *See also Western Watersheds Project v. U.S. Fish and Wildlife Svc.*, 2011 WL 2690430 at *3 (holding ranchers’ grazing interest threatened sufficiently to justify intervention as of right by potential for *procedural acceleration* of a species listing determination due to disposition of case, independently of whether the ultimate outcome of that process might be favorable).

Wherever an intervenor “would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.” Fed. R.

Civ. P. 24 advisory committee's notes (quoted by *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001)). Ranchers easily meet this liberal standard here, establishing their satisfaction of the second and third prongs of the Rule 24(a) test.

C. The Ranchers' Interests Cannot be Adequately Represented by Existing Parties.

Ranchers' interests, however, are not adequately represented by the existing (or proposed) defendants. It is true that, as applicants, Ranchers bear the burden of demonstrating such lack of adequate representation. But that burden "is minimal, and the applicant need only show that representation of its interests by existing parties *may be* inadequate." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (cleaned up) (emphasis added). What matters is "the 'subject of the action,' not just the particular issues before the court at the time of the motion." *Id.* (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)).

"The interests of government and the private sector may diverge." *Berg*, 268 F.3d at 823. For instance, intervention as of right is warranted where, as here, even though Idaho's government and Ranchers share "the same ultimate objective in the preservation of" government action, the government's "range of considerations . . . is broader than the profit-motives animating" private parties. *Id.* at 823. Likewise, representation is inadequate where, as here, private parties and the government have different roles to play under the contested government action they seek to defend. *Id.* In such a case, any presumption of adequacy with regard to representation "is rebutted . . . because Applicants and Defendants do not have sufficiently congruent interests." *Id.* Ranchers thus satisfy the "minimal" burden of raising the possibility that the existing—all public—parties' representation of their private interests "may be" inadequate. *Smith*, 830 F.3d 843, 864 (9th Cir. 2016).

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II. In the Alternative, the Court Should Grant Ranchers Permissive Intervention.

Alternatively, Ranchers request permissive intervention under Rule 24(b)(1)(B), by which “the court may permit anyone to intervene who... has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1). Permissive intervention may be granted when:

- (1) there is an independent ground for jurisdiction;
- (2) the motion is timely; and
- (3) the movant’s claim or defense and the main action ... have a question of law or fact in common.

Amanatullah v. United States Life Ins. Co. of the City of New York, No. 4:15-CV-00056-EJL, 2017 WL 2906045, at *1 (D. Idaho June 29, 2017), quoting *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989). The court must also consider any undue delay or prejudice to the adjudication of the rights of the original parties, and whether the movant’s interests are adequately represented. *Id.*

Ranchers meet the requirements for permissive intervention. This court has federal question jurisdiction under 28 U.S.C. § 1331. Ranchers’ motion is timely, and presents no risk of delay or prejudice. As demonstrated by Ranchers’ Proposed Answer, filed with their Motion to Intervene, Ranchers’ defenses present questions of law and fact in common with the main action. Finally, the existing parties cannot adequately represent Ranchers’ interests.

Conclusion

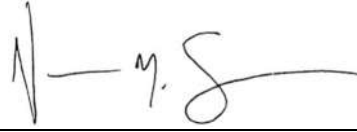
For the reasons given above, this Court should grant Ranchers’ Motion to Intervene as Defendants in this matter as of right under Rule 24(a)(2). In the alternative, this Court should grant Ranchers permissive intervention under Rule 24(b).

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Respectfully submitted this 30th day of August 2022.



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CERTIFICATE OF SERVICE

I hereby certify that, on August 30, 2022, I filed the foregoing document with the Clerk of the Court using this Court's CM/ECF system, which will send a notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D. Idaho L.R. 5.1(k).

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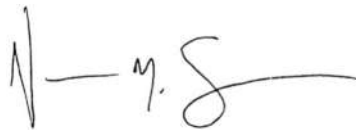
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